1990

Rita C. Gum v. James Richard Gum : Reply Brief

Utah Court of Appeals

Glen M. Richman; Attorney for Defendant/Respondent.
Rita C. Gum; In Propria persona Plaintiff/Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

RITA C. GUM,

Plaintiff and Appellant,

-vs-

JAMES RICHARD GUM,

Defendant and Appellee.

Court of Appeals
No. 90-0528-CA

Priority Classification
No. 16

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE
OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JOHN A. ROKICH
JUDGE PRESIDING

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In propria persona
Plaintiff/Appellant

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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENTS

I. Plaintiff did not wave her constitutional rights or the children's to due process of law. Can a Court make an unbiased and unprejudiced decision without weighing the testimony when ordering a mother and children to move from their home against their rights. Under what law or authorization does the Court have this discretion? Plaintiff could find none. If given to Court as a privilege it is open to or invites abuse.

II. The issue of judicial bias may not have been raised properly. The Plaintiff did not know how to raise the issue of judicial bias at the Trial Court level. Her attorney should have raised the issue instead of withdrawing. The Appellate Court should give consideration, under the circumstances, of what is in the record indicating that the Court had made

a decision to move her from her home even before evidence was presented as shown in the extensive excerpts from the Trial Transcript below.

III. There is ample evidence in the record to show unreasonableness of the property division. The issues were properly presented to the Court and tried on the evidence. The property distribution is unjust and clearly constitutes an abuse of discretion especially in view of the jointly held houses and other marital property of the parties.

IV. Matters raised by Plaintiff are reviewable. When Plaintiff took her case, pro se, the Court did not give her an extension of time to study the Record and to prepare and file the proper papers and motions; which were her right and duty in acting pro se. The Trial Court did not inform the Plaintiff of rights to seek relief from the pressure being placed upon her by the Trial Court or her rights to seek a new trial or to appeal the decree.

V. It is not clear from the record that the parties settled all issues. If the parties had stipulated and settled all disputed issues properly and fairly according to the laws of Utah there would have been no need for the Plaintiff to appeal the verdict. In chambers and off the record, Court did not merely confirm all agreements of the parties after finding it reasonable to do so, but arbitrarily reversed some over the objections of Plaintiff.

VI. The evidence from the record shows that the Findings of Fact are clearly erroneous. Much of the evidence of material mistakes, material misrepresentation, fraud, coercion, and/or undue influence was off the record and can not be used by the Appeals Court according to the rules. But this does not mean that it did not happen and the Plaintiff's rights were violated. The Findings of Fact and Conclusions of Law prepared by Mr. Richman, Attorney for Defendant, are not consistent with clauses in the Trial Brief or sufficient to support a fair judgment of the Court.

VII. It is not clear there was an agreement confirmed by the parties and the Court. A reviewing Court may set aside or modify a consent decree when adjudicated in the manner of instance case, with showing of fraud, undue influence, coercion, mistake of material fact, misrepresentation of a material fact or showing that consent was not given by Plaintiff.

VIII. The findings of fact are not sufficient to support the judgment of the Court. The Finding of Fact and Conclusions of Law were prepared by Defendant's attorney and handed to Plaintiff September 10th at 4:00 p.m. as she entered court. Plaintiff wasn't given the papers in advance to approve as the Court had asked. The Court may have assumed that they were correct and met with her approval. Many errors are shown below.

IX. Plaintiff offers a theory below for review and relief on her claim against the "quick sale" of the house. A remedy or relief can be designed by the Appellate Court including a review of the action in light of U.S and Utah laws. She can find no precedence in similar cases; it seems unique.

ARGUMENT

I. PLAINTIFF DID NOT WAVE HER CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, OR THOSE OF THE CHILDREN.

UNITED STATES CONSTITUTION, Section 1, 14th Amendment, and CONSTITUTION OF UTAH, Article I, Section 7. [Due process of law].

No person shall be deprived of life, liberty or property, without due process of law.

It is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment. Parry v. Bonneville Irr. Dist., 71 U. 202, 263 P. 751

The Court issued an order and reaffirmed the order requiring plaintiff to vacate defendant's home on or before the 20th day of May, 1990. plaintiff ignored that court order. During an Order to Show Cause and Motion for Management and Scheduling Conference, the Court reaffirmed that the plaintiff should be removed from the home within ten (10) days. plaintiff ignored that order. [Emphasis added] (Record 179, par. 6).

The short amount of time the Court gave the Plaintiff to move was unrealistic even if the Order was legal and Plaintiff had funds to move.

The home was also the Plaintiff's home as a joint tenant, with full rights of survivorship, and not as tenants in common, (Brief of Appellant, A-30) The parties also own a rental home in West Valley (Bennion) as joint tenants. [Emphasis added] (Brief of Appellant, A-31).

The Plaintiff is impecunious. She has no resources with which to pay the costs of moving and no present ability to provide substitute housing for the minor children of the parties. Plaintiff is 53 years of age and in fragile health (Record 148, par. 6).

Plaintiff has made diligent inquiry in an effort to find adequate housing for herself and daughters without success. In this regard she has inquired as to public shelters and is informed that housing is available only for a short time basis (Record 148, par. 7).

The unreasonable Order for the Plaintiff to move within 10 days included the minor children who clearly received no process or notice.

Even though this matter may now be "moot and meaningless" it was clearly erroneous and should not be tolerated by the Court in future cases.

II. THE ISSUE OF JUDICIAL BIAS MAY NOT HAVE BEEN RAISED PROPERLY.

Plaintiff did not know how to raise the issue of judicial bias at the Trial Court level. Her attorney should have raised the issue instead of/or before withdrawing. The Appellate Court should give consideration (under the circumstances) of what is in the record indicating that the Court had made

decision to move her from her home even before evidence was presented; as shown in the extensive excerpts from the Trial Transcript below.

The preconceived opinion or judgment of the Court leaning adverse to Plaintiff's reason for staying in her home until the divorce action was completed, or a suitable buyer was found, without just grounds or before sufficient knowledge, clearly indicates bias of mind and prejudice.

Injury to Plaintiff due to the judgment of the Court in ordering her to move from her home, in disregard of her and the children's rights, caused the loss of many thousands of dollars return from the sale of the home, in addition to very much pain and suffering for her and the children.

Trial Transcript excerpts:

Salt Lake City, Utah; Wednesday, July 11, 1990 (3:00 P.M.)

The Court: Do you think we are going to finish this by five o'clock? [Emphasis added].

Mr. Richman: Oh, sure. (Tr. p. 1, line 20 - 22).

The Court: We can waste a lot of time objecting.

Mr. Richman: Maybe I won't finish until five o'clock. (Tr. p. 2, line 23 - 25; p. 3, line 1).

Q. (By Mr. Richman) Mr. Gum, when you were married to your first wife did you purchase a home?

A. Yes, I did. (Tr. p. 3, line 24 - 25; p, 4, line 1).

Q. And is that where the Plaintiff is residing at the time?

A. Yes.

Q. Was the house remodeled after you married this present wife, Rita Gum?

A. Yes, it was.

Q. And whose money was used to remodel the house?

A. My money.

Q. Was it from your earnings at work?

A. Earnings, my earnings.

Q. And savings?

A. And savings.

Q. And was there any money at any time provided to you by Rita Gum, the plaintiff in this action, to remodel or purchase or do anything toward the upkeep of this house? [Emphasis added].

A. None whatsoever. (Tr. p. 4, line 7 - 24).

The Record will show some of Defendants answers were perjury; when he indicates that only his money was used to remodel the house.

Q. And you have been married a total of about eight years?

A. Approximately eight years.

Q. During that time you had three divorce actions. Do you recall that at the last divorce action she was ordered to get out of the house?

A. Yes she was.

Q. And she did not?

A. She did not. (Tr. p. 5, lines 3 - 12).

(If that Order was legitimate, why wasn't it enforced?)

Q. Is the house for sale?

A. The house is for sale. (Tr. p. 6, lines 23 - 24).

The Court: Really, the only issue is whether she ought to vacate the premises. (Tr. p. 7, lines 23 - 24).

Q. (By Mr. Richman) Let me hand you what you has been marked as Defendant's exhibit 1-D.

Mr. Spafford: The answer to the question, your Honor, is yes. That is the issue.

Q. (By Mr. Richman) I ask if you can identify that?

The Court: And I made an Order that she's to vacate by May 20th.

Mr. Richman: Yes.

The Court: And she's not out?

Mr. Richman: This is right?

The Court: What is the issue?

Mr. Richman: We want to show the house--

The Court: I don't care what the house looks like. Why doesn't she get out?

Mr. Spafford: That's right.

The Court: That's the issue. And I'll tell you, if that's the Order, and if she isn't out, well, the Court will enforce it's Order.

Mr. Spafford: Or listen to mitigation.

The Court: The fact remains, if I entered the Order, and I will allow-- the Order will be enforced unless there is some extenuating circumstances that precluded this individual from moving.

Mr. Spafford: That's right.

The Court: And I will tell you this, I'm not prejudging the case, but they have to be very substantial reasons why the house isn't vacated.

Mr. Spafford: I think, your Honor, that sums up the case.

The Court: Fine. Then since--

Mr. Richman: May I respond?

The Court: Let me put it this way. I'm going to rule in your favor unless she can come up with something, and then I'll give you a chance to respond. Lets hear from her as to why she can't move off the premises, because your motion is well taken.

Mr. Richman: So the Court knows where we stand. I'm probably finished with him as far as testimony. This is the good season, it is thought, to sell houses.

The Court: Mr. Richman, let me tell you, you don't need to go any further.

Mr. Richman: That's-- okay. That's all I have with my client.

The Court: Your motion is well taken unless she can convince me to the contrary, and then you can rebut. (Tr. p. 8, lines 3 - 25; p. 9 lines 1 - 25; p. 10, line 1).

Q. (By Mr. Spafford) I show you what has been marked for identification as Exhibit 9-P and ask you if you can identify what that instrument is.

A. It's a Warranty Deed.

Q Does that bear your signature?

A. Yes, it does.

Q. Does it pertain to the property that we referred to earlier today?

A. Yes, it does.

Mr. Spafford: No further questions.

Mr. Spafford: I will offer exhibit 9.

Mr. Richman: May I see that? May I see the deed?

Mr. Spafford: May the witness step down, your Honor?

Mr. Richman: I object to this, your Honor. That has no relevance. It merely shows the status of title of the property.

The Court: Okay.

Mr. Richman: What bearing does that have?

The Court: Okay. I'll go ahead and admit it. All it is for purposes of showing title. (Tr. p. 10, lines 11 - 25; p. 11, lines 1 -7).

(Mr. Richman spends a lot of time going into Plaintiff's deposition and the previous time in court; when Mr. Welker was Plaintiff's attorney)

The Court: I'll go ahead and hear what her reasons are. Why haven't you moved out after I told you and the Order had been entered?

Q. (By Mr. Spafford) Let me put it this way. Where would you go if you moved out?

A. I don't have <u>anyplace</u> to go. [Emphasis added].

The Court: <u>That's immaterial</u>. [Emphasis added].

Mr. Spafford: It goes to the issue of contempt, your Honor.

The Court: Let's find out why she doesn't move out, <u>not where she's going to go</u>. [Emphasis added].

Q. (By Mr. Spafford) Why haven't you moved out?

A. I don't have anyplace to go. <u>I don't have any money to go anyplace</u>. [Emphasis added] (Tr. p. 19, line 23 - 25; p. 20, line 1 - 13).

The Court: Well <u>where she goes is immaterial</u> as far as I'm concerned. [Emphasis added].

Mr. Spafford: Let me make a proffer, your Honor, to save a lot of time.

My proffer is that she earns less than $600 a month; he earns $3,000 month. This couple has two homes. The one is the exhibit 9-P, which is the home they're living in. It is owned jointly by them, and while admittedly it was acquired prior to the marriage, during the marriage from

marital assets the home was remodeled. Indeed it was conveyed to her jointly with him, so she's has an equitable interest in the property.

They have a second piece of property in Salt Lake County, the lot 72, Whitewood Estates, another home which is also deeded to the two parties jointly, Mr. Gum has placed, under a rental agreement, his son in the second piece property, and he is collecting the rent on it.

So effectively, your order dispossesses her of the home she's living in and effectively grants him the possession of both pieces of property, two homes. [Emphasis added].

So we have the ludicrous situation of a woman who earns a poverty level wage, who has no place to go, and who has a equity in two separate pieces of property; and the husband winds up with both pieces of property while she's effectively put out on the street. [Emphasis added] (Tr. p. 20, lines 19 -25; p.21, lines 1 -20) .

Q. All right. Who lives in the house with you?

A. My two-- our two minor children.

Q. Are those his children as well as yours?

A. Yes they [are].

Q. So, they would be put out of the home also?

A. They would be put out of the home also, sir.

Mr. Spafford: That's all, your Honor. I submit it.

The Court: Okay. Now--

Mr. Richman: Well, your Honor, this is why I have a little difficulty with Mr. Spafford. That was far beyond a proffer.

The Court: Let's go ahead.

Mr. Richman: Let me finish.

The Court: I can sort this all out.

Mr. Richman: I don't think so, because he said as if that is a factual matter.

The Court: We're going to waste a lot of time here. I can sort this out. I told you in the first instance I'm inclined to have her move out of the house: They haven't shown me any reason why she shouldn't be out. So, I'm not convinced that the fact that she hasn't any place to go is a reason that I should not enforce the Order. So, you know-- [Emphasis added] (Tr. p. 24, line 21 - 25; p. 25, line 1 - 22).

Mr. Richman: Let me proffer some facts that will assist the Court.

The Court: That's what I'm trying to get--

Mr. Richman: There's a man in the back of the room that owns the house that he speaks of that is their house in West Valley. This man paid all the money for the down payment . He's here to testify. He has paid out the payments. The house was taken in their names. During their last divorce they gave a Quit Claim Deed. [Emphasis added].

The Court: Okay.

Mr. Richman: That's a fact that is basic and it's contrary to what he represents to the Court.

The Court: So therefore--

Mr. Richman: Basic fact.

The Court: Therefore today I only have the one house before me, one house. [Emphasis added] (Tr. p. 26, line 7 - 23).

(Mr. Richman made his proffer to prove that the parties son, Jim, owns the second home in West Valley (Bennion) but the evidence clearly shows that Jim has never owned the other home)

Q. (By Mr. Spafford) Mrs. Gum, I show you what has been marked as Exhibit 11-P. Could you tell me what that document is?

A. It's a Warranty Deed.

Q. To what property?

A. 3685 South 3650 West.

Q. Is that the West Valley property?

A. That is, sir.

Q. That is the property not presently occupied by you?

A. Yes.

Q. Who is occupying that property?

A. Mr. Gum and his son.

Q. Who owns that property?

A. Mr. Gum and myself. (Tr. p. 28, line 18 - 25; p. 29, 1 - 7).

Mr. Spafford offers the Warranty Deed as Exhibit 11-P (CONVEY and WARRANT to JAMES R. GUM and RITA C. GUM, husband and wife, as joint tenants--) (Brief of Appellant, A-31).

The Court: Now Mr. Richman, you say a Quit Claim has been executed between Mr. and Mrs. Gum to the son?

Mr. Spafford: May I continue?

The Court: Yes, you may.

Q. (By Mr, Spafford) Mrs. Gum, have you ever knowingly conveyed away your interest in the West Valley home?

A. No, sir, I haven't.

Q. Now, some reference has been made to an earlier divorce between you and Mr. Gum. Was that divorce granted?

A. No, it wasn't.

Q. Was it dropped and withdrawn?

A. Yes.

Q. During the course of that divorce--

A. He's the one that applied for that divorce, by the way.

Q. During the period that that divorce was pending did you knowingly Quit Claim that property?

A. No, sir. (Tr. p. 29, line 9 - 25; p. 30, line 1 - 4).

Q. Now, Mr. Richman is going to question you about exhibit 12-D. That's a Quit Claim Deed. Does that refresh your memory at all?

A. No, sir. That is not mine.

Q. Is that your signature?

A. No. sir.

Mr. Richman: I didn't hear her answer.

The Court: I couldn't hear it.

The witness: It looks like mine, but I never signed it. I wouldn't do that.

Q. (By Mr. Spafford) Did you ever appear before a Notary Public?

A. No, sir.

Q. On that?

A. No, sir. (Tr. p. 30, line 7 - 21)

(Cross examination of parties son Jim)

Q. (By Mr. Spafford) You bought the house, but you bought it from your father and in your father's name?

A. It was put in their name.

Q. Why was it in their name when you bought it?

A. Personal reasons.

Mr. Spafford: Nothing further.

Mr. Richman: Nothing further.

The Court: What were the personal reasons?

The witness: Very bad credit [Emphasis added].

The Court: Anything further of this witness?

Mr. Richman: Nothing further.

Q. (By Mr. Spafford) Are you claiming the credit for interest on his tax return?

A. They haven't been claimed by anybody.

Mr. Spafford: I see. That's all, your Honor.

The Court: Fine. You may step step down. Anything Further?

Mr. Richman: Nothing further, your Honor.

The Court: Do you have anything further?

Mr. Spafford: Just Argument.

The Court: Pardon?

Mr. Spafford: Just argument.

The Court: What am I to hear that I haven't already heard? (Tr. p. 39, 13 - 25; p. 40, 1 - 15).

(Close examination of the Quit-Claim Deed shows the date: 28th day of August 1987. How could it have been given, as Mr. Richman proffered, "during their last divorce?" The last complaint was filed October 31, 1988) (Record 178).

The Notary Public, Fay Anderson, failed to date the Quit-Claim Deed; it's not the legal title to the said property which the Warranty Deed clearly is)

A properly executed Quitcaim Deed (which this one isn't) transfers only what interest parties may have had in the property at the time it was

executed, not the property title itself. Interest of the parties has changed considerably since 1987 as the Quit-Claim Deed was never acted upon.

If the property is sold to Jim or another party a Deed to properly transfer the title will be required to claim capital gain or loss taxes.

An amended federal tax should be filed by Defendant to obtain credit for interest and upkeep expenses and divide the returns with Plaintiff.

Mr. Richman perpetrated a fraud upon the Court, claiming that the Quit-Claim Deed was proof of ownership, which Court accepted as fact. The parties still hold the West Valley, (Bennion), rental home as joint tenants. The Trust Deed is still in force, as the matter was not resolved by the Trial Court; Plaintiff and Defendant are responsible that the payments are made and proper reporting on tax returns. This could cause serious problems)

The Court: If you follow the rules of proper practice-- and as I say again, I'm not trying the attorneys here today, but I'm going to Order that she vacate the house. That is going to be the Order. She will vacate it within ten days, and if she doesn't vacate within 10 days, then the Court will cite her for contempt. (Tr. p. 42, lines 4 - 10).

(The Court ordered Plaintiff and the children to move; though the facts presented above prove that the parties were joint tenants of both homes)

The Court: But she has ten days to get moved-- But she's going to vacate, period.

What is the next issue? (Tr. p. 42, lines 22 - 25; p. 43, lines 1 - 6).

The Record of the trial shows additional substantive evidence of judicial bias. Much bias was also exercised by Court off Record in chambers.

Plaintiff did not know how to handle judicial bias at the Trial Court level. Her attorney, Mr. Spafford, must have known how to handle it —and should have moved for a new trial; before his withdrawal as counsel.

If the issue of judicial bias was not preserved and raised properly for the Appellate Court, Plaintiff's attorney surely should have done it.

III. THERE IS AMPLE EVIDENCE IN THE RECORD TO SHOW UNREASONABLENESS OF THE PROPERTY DIVISION.

During the marriage relationship, the parties have acquired investments which should be equitably divided. (Par. 8, Record 3). The issues were properly presented to Court and tried on the evidence. The property distribution is unjust and constitutes a clear abuse of discretion; especially in accord with Utah code regarding the jointly held houses.

The West Valley house (Bennion) was one of those investments covered in Plaintiff's Verified Complaint. It was (and still is) a rental investment, rented to their son Jim under a verbal agreement; in which he may purchase the house if he ever become able, which he hasn't.

Jim has not purchased the home and may never qualify for a loan unless he corrects his "very bad credit."

A properly executed Quitclaim Deed transfers only what interest a party may have in the property; it is not a title to mortgaged property. Mortgage companies issue Warranty Deeds, which describe the interest.

> Quitclaim deeds do not imply the conveyance of any particular interest in the property. Grantee acquires only interest of his grantor, "be that interest what it may." Nix v. Tooele County, 101 Utah 84, 118 P.2d 376 (1941).

> A written contract for the sale of real estate described, which stipulates that the vendor agrees to sell, subject to existing liens and restrictions of record; that the purchaser agrees to purchase; paying a specified sum; and that the vendor, on receipt of the price and mortgage securing a deferred payment, will deliver a quitclaim deed——may not be varied by parole, to the effect that before the execution of the contract the purchaser was told that the only title the vendor could give was such as he had and no more, since whatever was said before the execution of the contract was merged

therein and became immaterial. Wallach v. Riverside Bank, 206 N.Y. 434, 100 N.E. 50 (1912).

The rental home in West Valley (Bennion) is held by the Plaintiff and Defendant as joint tenants. Subject to a Trust Deed in favor of Western Mortgage Loan Corporation dated September 4th, 1986 in the original principal amount of $69, 857.00 which Trust Deed the grantees herein assume and agree to pay. [Emphasis added] (Brief of Appellant, A -31).

IV. MATTERS RAISED BY PLAINTIFF ARE REVIEWABLE.

When Plaintiff took charge of her case, pro se, the Court did not give her an extension of time to study the record to prepare and file the proper papers and motions; which were her right and duty in acting pro se.

At no time did the Trial Court inform the Plaintiff of her rights to seek relief from the pressure being placed upon her, by the Trial Court and Defendant, or of her right to seek a new trial; or to appeal the decree.

The Trial Court did err in ruling on motions and issues, and the Appellate Court may review the deliberation and make appropriate disposition which could include setting aside or modifying the decree.

If an Appellate Court were to vacate a consent decree that was not properly obtained in the Trial Court, it would be performing its proper task; seeing that the trial was fair and justice was served.

If an Appellate Court finds that the Trial Court acted in an arbitrary and capricious fashion and did not allow the Plaintiff to present her case, pro se, according to Utah law, the Court should remand the case to the Trial Court for specific findings under strict standards in order for justice to be rendered to her and the children; as the laws of Utah justify. If this were not so, the positive efforts of the legal system to encourage justice would

be negated and to no avail and the respect for and the inviolability of the legal system would surely be in decline.

V. IT IS NOT CLEAR FROM THE RECORD THAT THE PARTIES SETTLED ALL ISSUES.

If the parties had stipulated and settled all disputed issues properly and fairly according to the laws of Utah there would have been no need for Plaintiff to appeal the verdict. In chambers and off the record, Court did not merely confirm all agreements of the parties after finding it was reasonable to do so; but arbitrarily reversed some.

Plaintiff had presumed that Court would review the issues with reasonableness, but this was not the case. For example when the Plaintiff questioned Court about her husband's retirement benefits, Court turned to Mr. Richman and asked, "What about the retirement benefits". Mr. Richman replied, "She doesn't get any". Court then answered Plaintiff, "You don't get any." This was undue influence and was Mr. Richman also making decisions and judgments in the case? Of course this conversation is not in the Record, but the Trial Brief which Mr. Richman prepared is.

The defendant is willing to divide equally any retirement earned during the parties' marriage or accruing during the parties' marriage. (Record 181, par. 3).

This issue could be fairly and properly addressed with a new trial.

VI. THE EVIDENCE FROM THE RECORD SHOWS THAT THE FINDINGS OF FACT ARE CLEARLY ERRONEOUS.

There was extensive discussion between the Court the Plaintiff and Defendant's counsel in the Court's chamber on September 6th, and also September 10th when Defendant was then present.

Much of the evidence of material mistakes, material misrepresentation, fraud, coercion, and/or undue influence was off the record and can not be used by the Appeals Court according to the rules. But this does not mean that it did not happen or that Plaintiff's rights were not violated.

Plaintiff was told, in chambers, what she was to get whether she agreed to it or not. She was told what she would agreed to, as stipulation, when no agreement was reached. She saw that she wasn't going to get a fair trial and decided that her only recourse was to appeal. She didn't know at the time that she could ask for a new trial.

The Court did not inform her of options for a new trial —or of appealing, either in chamber or open court. So she lost the opportunity for a new trial within the time period required; therefore being forced to appeal.

The Plaintiff: Is there any waiting period?

The Court: <u>There is no waiting period. This winds it up. It's concluded. When I sign the documents, it's concluded.</u> [Emphasis added] (Tr. p. 61, line 25; p. 62, line 1 - 4).

The Court: That is suffice. Pursuant to the stipulation of the parties the divorce will be granted, a mutual divorce will be granted, <u>which will become final upon entry</u>. [Emphasis added] (Tr. p. 64, line 20 - 23).

Plaintiff thought <u>that could be it</u> —but, she still believed that she could appeal to get justice for the children and herself.

In the Findings of Fact and Conclusions of Law, prepared by Mr. Richman, we find evidence of material mistakes, and even coercion. (Record 189 and Brief of Appellant, A-11 to A-21):

--Plaintiff appearing in person pro se, her previous attorney having withdrawn effective the 30th day of July, 1990; Notice to Appoint Successor Counsel having been made on the 31th day of July, 1990; ---

This is true, but, was her counsel not coerced into withdrawing?

--and certain agreements were made and stipulated into the record pertaining to all issues in the action--

This statement is distorted, all issues were not stipulated or agreed to by the Plaintiff and Defendant. Many were and are still unresolved.

Fact #5 is distorted from the truth. The mortgage of the home located at 655 H Street was taken by the parties as joint tenants to pay off the old mortgage and do the remodeling; two additional loans were required to complete the job. This paragraph is worded in a manner to make it appear that this property remained premarital property of Defendant and that premarital savings paid for the remodeling; and was his to keep.

The net equity of the home (as joint tenants) was $12,574.75 including the check in Brief of Appellant, A-46; which was not reported to the Trial Court for division between the parties. Fact #5, by including home with premarital property as though it still was, is material misrepresentation.

Nothing was said in the Findings of Fact and Conclusions of Law or the Trial Brief, (prepared by Mr. Richman), about the property held by the parties as joint tenants in West Valley City (Bennion); was this fraud or a material mistake? (Brief of Appellant, A-31).

Plaintiff told Court she did not agree to Fact #14, Mr. Richman told Court that she had agreed to $3.000.00. Court told her that "$3.000.00 is all that you're going get. Provided those items are returned on or before the 10th to him, [Defendant]." This proved to be an impossible situation; for Plaintiff had sold items to obtain funds to move from their home. She was not able to get these items back. She did return the Llardro.

She told Court, on the 10th of September, that she was unable to get the items back. This made no difference to Court, she would have to return the

items if she wanted to get her money. Mr. Richman said, "that's O.K., we'll take it out of the child support money." This was coercion and undue influence; not in the Record. Defendant gave her the $3,000.00 anyway

VII. IT IS NOT CLEAR THERE WAS AN AGREEMENT CONFIRMED BY THE PARTIES AND THE COURT.

If Plaintiff was coerced into an agreement there was no consent for the Court to confirm. Klein v. Klein is then not applicable.

As in. Klein v. Klein 544 P.2D 472, 475 (Utah 1975), the appellant did not answer audibly before the Court on the record that she accepted the stipulation of the parties and understood the same.

> The Court: Well, you let me know if you can't get it. But other than that, do you concur in everything else that has transpired here since 1:30? [Emphasis added].
>
> You have to answer audibly, yes or no.
>
> The Plaintiff: Yes.
>
> The Court: If you will prepare the Order beforehand. (Tr. p. 62, line 13 - 19)

Plaintiff, acting pro se, was confused by "do you concur" (she hates to admit it) but at the time, she didn't know the meaning of concur. One Webster definition; to come or flow together esp. with force or violence, may have fit her situation. The Court had given her conditions she could not comply with, only instructing her, "You have to answer audibly, yes or no." After answering, yes, Plaintiff was confused as to what Order was to be prepared beforehand. It may appear from the Record that she agreed with everything else that had transpired there since 1:30, but she hadn't.

It is not clear there was an agreement confirmed by the parties and the Court; there are still many unresolved issues that need to be settled.

VIII. THE FINDINGS OF FACT ARE NOT SUFFICIENT TO SUPPORT THE JUDGMENT OF THE COURT.

The Finding of Fact and Conclusions of Law, prepared by Defendant's attorney, were handed to Plaintiff along with Decree of Divorce on September 10th at 4:00 p.m. as she entered court.

> The Court: If you give them to her in advance, then if she doesn't.t answer then I will assume that they're correct and meets her approval. (Tr. p. 68, line 4 - 6).

Plaintiff wasn't given the papers in advance to approve as Court had asked. She tried a number of times to get the papers, but to no avail, (Mr. Richman's secretary said they were not ready). Court may have assumed they were correct and met with her approval. There were many errors.

Plaintiff did not affirm and approve the specific findings of fact which are said to have recited the parties' agreement before Court on the 10th day of September, 1990, the date of entry of decree. She only recalls reading The Findings of Fact and Conclusions of Law after returning home.

Plaintiff did specifically assign an error to the award of alimony. In the Brief of Appellant, p.37, III, Fact #5 is a clerical error. It should be #15.

Should the Appellate Court desire to look at the substance of the matters bearing on alimony considerations, there is ample evidence in the letter of Dr. Thomas B. Keith: (Brief of Appellant, A-34)

> --Mrs. Gum has chest pain, which is probably due to mitral valve prolapse, which is present by physical examination and on echocardiogram.-- The chest pain, although it is not likely to be due to coronary artery disease, is none the less quite limiting in terms of her activities.
>
> In addition to her mitral valve prolapse, the patient has diabetes melitus, which is treated by Dr. Robert Maddock.

Plaintiff overextended herself working on two jobs at the same time to support herself and children, losing both jobs. She received assistance from H.E.A.T. on her utilities and gets food stamps. She may need public assistance to enter suitable employment. She has never worked as a secretary. But she welcomes the opportunity to become self sufficient.

IX. PLAINTIFF OFFERS A THEORY FOR REVIEW AND RELIEF ON HER CLAIM AGAINST THE "QUICK SALE" OF THE HOUSE. THE MATTER IS REVIEWABLE.

Plaintiff's claim that Court erred in ordering a quick sale of the parties' home on H Street is not "moot and meaningless". A remedy or relief can be designed by the Appellate Court including a review of the action in light of U.S and Utah laws. Was there any legal basis for the action?

Plaintiff offers a theory to the reviewing court for correction of the matter as both homes of the parties were held in joint tenancy.

In the Arizona case of Nesmith v. Nesmith 540 P.2d 1229, 112 Ariz. 248 (Ariz. 1975) is stated:

Joint tenancy property is to be divided equally by Trial Court in divorce, A.R.S. § 25-318. Title 30 Chapter 3, Section 5, Utah Code Annotated, 1953, as amended, Land v. Land, 605 P.2d 1248 (Brief of Appellant, par.6, p.43).

Net equity after selling costs was $12,574.75 including a $2,345.75 check (Brief of Appellant, A-46). This amount should be divided equally according to Utah law with each party receiving $6,273.87. This could help Plaintiff develop employment skills to support herself and the children.

Had there been time to sell the home at its appraised value each party could have received $45,000.00; alimony would not have been needed.

In Plaintiff's previous action, Answer to Amended Complaint and Verified Counterclaim, October 26, 1988:

It is reasonable that the defendant be awarded a sum of not less than $400.00 per month for a period of two (2) years as alimony from Plaintiff.

During the course of the marriage, the parties acquired a home located at 5685 South 3650 West, Salt Lake City, Utah. It is fair and reasonable that Plaintiff be awarded exclusive use and possession of the home and real property and that the defendant receive an equitable lien in said property in the amount of one-half (1/2) of the equity.

These provisions were offered because Plaintiff did not know what her rightful interests were in the homes. Defendant would have gotten the H Street home having three times the value of the West Valley home.

With all the pressure being put on her by Defendant and Court to move quickly, in an Affidavit of Plaintiff, she made a counter offer:

As an alternative, plaintiff is willing to convey her interest in said home and to vacate the same in exchange for payment of the sum of $3,000.00 which represents a diminished part of one-half of the projected equity of said property and which fund would provide her a means of finding temporary suitable housing for herself and children (Record 148, par. 10.).

A counter offer of $3,000.00 by Mr. Richman, which was not approved by either Defendant or Plaintiff was construed by the Court, in chambers, as being the total settlement. (Brief of Appellant, A-48).

Conditions have changed. The West Valley Trust Deed is still in force, the matter was not resolved by the Trial Court and still needs to be resolved; Plaintiff and Defendant are still responsible that the payments are made and that the tax matters are reported properly to the I.R.S.

There are a number of ways this matter could be resolved. One being, that Plaintiff and Defendant would each pay one half of the mortgage. Plaintiff and the children would be allowed to live in the home during the minority of the children; at the end of that time the home could be sold, dividing any net equity equally between the parties according to Utah law.

CONCLUSION

It is clear from the record that there has been a miscarriage of justice in the instance case. Plaintiff's and children's rights were clearly violated.

Constitutions were created to guarantee certain rights to citizens and laws are created so that these rights may be administrated with justice.

Laws and rules of proper practice are created and amended so that justice may be properly rendered. Not following the laws and rules result in error and bad law. Bad law leads to misunderstanding and chaos.

Courts were not intended as an arena where lawyers battle and bend the law to win for their clients; taking unfair advantage of their opposition or worse yet, working fraud upon the Court.

Courts were created so that facts may be properly presented; resulting in fair decisions, insuring justice is served; not that the "best lawyer" wins.

Plaintiff respectfully requests the Appellate Court to consider the record and conclusions in this case and the relief sought in this appeal.

There were just far to many issues unresolved by the Trial Court.

If Appellate Court finds that it can not resolve this case with justice to all parties, including the children —then the Court should remand the case to the Trial Court; in order that it may be properly and fairly retried.

Respectfully submitted this 11th day of April, 1991.

Rita C. Gum

Rita C. Gum
In propria persona
Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify I caused four true and correct copies of the Reply Brief of Appellant to be hand-delivered to the following counsel of record on this 11th day of April, 1991.

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